

*To put truth into action*

## WITH FIDELITY TO THE CONSTITUTION \*

William H. Webster

Not long ago somebody gave me a lapel button which reads, "My job is so secret that even I don't know what I'm doing." There may be some correlation between that statement and how we feel about secrecy. It conjures up images of Orwellian intrusion by government, of clandestine activities that put at risk our most cherished institutions and our individual liberties, of mistakes and blunders concealed within documents classified "Secret" or "Eyes Only."

There is, of course, a historical basis for all of these concerns, including some recent history which has been unfolding daily on our television screens. But that is not my real purpose in speaking to you today. Rather, I propose to talk about the collection of intelligence at home and abroad and how our Constitution, without a single reference to intelligence, has accommodated this function so vital to our national security, and has inspired a system of oversight through the separation of powers.

Taking a leaf or two from my experiences on the federal bench and as Director of the FBI, I start my new responsibilities with two deeply held cardinal theses: first, that the intelligence activities vital to the protection and preservation of our national security must be conducted objectively, professionally, and lawfully, with absolute fidelity to our Constitution and to our laws; and, second, there must be a trustworthy system of oversight and accountability which builds, rather than erodes, trust between those who have the intelligence collection responsibility and those who act as surrogates for the American people.

In the past 10 weeks, I have come to know and to meet in this country and in various places around the world some extraordinarily gifted, dedicated, bright, able Americans assigned to our clandestine responsibilities. And I have watched the President in the privacy of a room in my office decorate four silent soldiers of democracy for exceptional bravery on behalf of our country.

### The Major Role of Intelligence

Intelligence collection has always played a major role in our history and is at least as old as our Constitution. A couple of years ago, Malcolm Forbes presented Bill Casey and me with facsimilies of a letter by George Washington written to Major Tallmadge on September 24, 1779, in which he outlined some of his thoughts about the need for, and the requirements of, good intelligence

\* Remarks delivered by Judge Webster, Director of Central Intelligence, to the Institute of Judicial Administration, in San Francisco, California, on 8 August 1987.

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work.<sup>1</sup> And I am also reminded that in 1777 Washington wrote to Colonel Elias Dayton discussing the need for intelligence in these words: "The necessity of procuring good intelligence is apparent and need not be further urged. All that remains for me to add is that you keep the whole matter as secret as possible. For upon secrecy, success depends in most enterprises of this kind, and for want of it they are generally defeated."<sup>2</sup> In 1790, secret funding for foreign intelligence activities was formalized by Congress in the form of a secret contingency fund for use by the President.<sup>3</sup>

Today our government depends heavily upon accurate intelligence: intelligence to formulate and conduct our foreign policy, intelligence to verify the arms agreements that we have signed and to judge whether or not we could verify the arms agreements that may be signed in the future, and intelligence to understand both the military capabilities and the intentions of our adversaries. Our primary consumers are the President, the Vice President, the Secretary of State, the Secretary of Defense, the Secretary of the Treasury, the National Security Council, and of course, the intelligence oversight committees of the House and Senate.

Intelligence—political, economic, and military—must be gathered early and accurately. Recently I spent a day at NORAD, in Colorado Springs, which is one of the principal early warning systems for our country's national defense. And a day there can't help but make one aware of the critical importance of gathering early and accurate intelligence for our national defense. Much time has passed since our Constitution was formed, and now in terms of survival warnings, we think in terms of minutes rather than in months and years.

The forms of intelligence collection vary from the human intelligence that we are all aware of—clandestine intelligence and the gathering of public source information around the world—to signals and communications intelligence and imagery intelligence, the latter of which involves satellites with almost near-real-time capability where a substantial amount of our budget is spent.

It is important that information that is collected be developed in an objective way—that the Director of Central Intelligence and the people who analyze the information be seen as giving our best estimates, not to "cook the books" or to shape or influence policy, but to provide policymakers with the kind of information upon which they can make the best decisions in the interest of our national security.

### **Implementing Foreign Policy**

In addition to collection and analytical activities, the CIA plays a role in the implementation of foreign policy and this is done through its covert activities. These may include political work through communications—getting our message out—training, supplying important materials for those whom we

<sup>1</sup> *Writings of George Washington*, GPO 1933, Washington, DC, Volume 8, p. 478F.

<sup>2</sup> *Writings of George Washington*, GPO 1933, Washington, DC, Volume 16, pp. 330-332.

<sup>3</sup> *Annals of Congress*, 1, Cong., Volume II, p. 2292; *Statutes at Large*, 1, p. 128. See also *Annals of Congress*, 2 Cong., p. 1412, *Statutes at Large*, 1, 299, The Act of February 9, 1793.

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support, and giving advice. Although covert action is not defined by law, the term has come to be understood as referring to activities conducted in support of national foreign policy objectives in such a way that the role of the United States Government is not apparent.<sup>4</sup>

Just as intelligence activities were conducted at the beginning of our nation's history, covert actions also played a role in the founding of our country. Covert actions were employed to obtain arms in exchange for food in Bermuda at the outset of the Revolution.<sup>5</sup> And covert actions were used to gain the support of the French<sup>6</sup> and to influence the Canadians at the time the Revolution broke out.<sup>7</sup>

In subsequent years, and in my lifetime from President Roosevelt forward, every President has endorsed and used covert action to support the foreign policy of this country. Although covert actions traditionally claim only a very small portion of the CIA's budget, they are the focus of the greatest congressional and public attention. And having seen some of the responsibilities for covert action move outside the CIA into the National Security Council and, fortunately, removed therefrom hopefully never to go back again, we have only added to the confusion, suspicion, and the ill ease of the American people. I have heard the Iran-Contra situation described as a government without rules inside a government that did not know. I hope that I can convince you that we have rules that, if followed by men of integrity and dedication, will meet the constitutional requirements and sustain our national security needs.

We have, of course, secrecy. Both Congress and the judiciary have recognized the need for secrecy in matters of national security. Those of you on the bench and those of you who argue cases know that in the Freedom of Information Act there are express provisions protecting from disclosure those matters of foreign counterintelligence and information supplied to us by foreign intelligence agencies.<sup>8</sup> The Foreign Intelligence Surveillance Act, for example, provides for a special court to review, in secret, the applications filed to conduct electronic surveillance for foreign intelligence purposes.<sup>9</sup> This statute has been found to be within the confines of the Constitution.

The main purpose of secrecy in these efforts is to preserve and protect sources and methods. These are two terms that were relatively unknown to me when I came to Washington nine years ago but which I have come to respect

<sup>4</sup> Executive Order 12333, *United States Intelligence Activities*, December 4, 1981, General Provision 3.4 (H); See Also *Glossary of Intelligence Terms and Definitions*, Intelligence Community Staff, NFIB NO. 24.1/18, June 15, 1978, p. 3

<sup>5</sup> *Writings of George Washington*, GPO 1933, Washington, DC, Volume 3, pp. 385-388, 420-422, and 476-478; also Volume 4, p. 53. (The Story of the "Bermuda Gun Plot" at St. George's was retold graphically on four postage stamps issued by Bermuda on October 27, 1976, the two-hundredth anniversary of the raid).

<sup>6</sup> Villanueva, Marcel, *The French Contribution to the Founding of the United States*, New York, Vantage, 1975; and Auguer, Helen. *The Secret War of Independence*, New York, Duell, Sloan, and Pearce, 1955.

<sup>7</sup> Smith, Justin H., *Our Struggle for the Fourteenth Colony, Canada and the American Revolution*, New York, Putnam, 1907, 2 Volumes.

<sup>8</sup> *Freedom of Information Act*, P.L. 93-502, November 21, 1974, S552, B(1) and (3).

<sup>9</sup> *Foreign Intelligence Surveillance Act of 1978*, P.L. 95-511, October 25, 1978.

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as real and not persiflage. If we cannot protect our sources, whether they are FBI informants or foreign assets developed around the world, we will not get the information that we need. If we cannot protect the sensitive methods by which we collect that information, both in terms of individuals on the ground and satellites in space, we will cease to have the means of collecting information.

Covert capability is essential in our foreign policy in providing needed support for liberation movements and often in providing support to governments, and working in collaboration with other governments who do not wish, for legitimate political reasons of their own, to have the US role and involvement publicly known.

### **The Oversight Committees**

While secrecy is necessary in these circumstances, there are, nevertheless, official surrogates watching out after your interests in the form of congressional oversight. Intelligence collection and the use of intelligence is a shared responsibility just as Congress has a role in the formulation of foreign policy and Congress has a specific role in the funding of our activities. That separation of power, that sharing of power, operates to protect our citizens.

In 1976 and 1977, both houses of Congress established intelligence oversight committees to monitor all significant intelligence activities and expenditures. We find many of the rules that I referred to embodied in the National Security Act, the Hughes-Ryan Amendment, and the Intelligence Oversight Act. The oversight committees, operating under those acts, have formalized the reporting of intelligence and covert actions to Congress. The intelligence community is now required by law to keep the intelligence committees fully and currently informed of all intelligence activities. Under the Hughes-Ryan Amendment, the President must find that each covert action is important to the national security before the operation can be initiated. And these are the findings that you have heard about in the television portrayal of the Iran-Contra issue.

Under law it is our duty to notify the committees of any significant intelligence activities which include any activities requiring a finding under the Hughes-Ryan Amendment. Now under the statute, to meet extraordinary circumstances affecting vital interests of the United States, the President can limit that notification to the Chairman and ranking minority member of the intelligence committees, to the Speaker and the Minority Leader of the House of Representatives, and to the Majority Leader and Minority Leader of the Senate—referred to, in trade parlance, as the “gang of eight.” And there is another statutory requirement that the intelligence committees be fully informed “in a timely fashion” of intelligence activities in foreign countries other than those solely for the purpose of collecting intelligence for which prior notice was not given—and the President must state the reasons for not giving prior notice in those instances.

Therein lies some of the debate that is going on today. As you know, in the Iran-Contra matter, Congress was not notified for well over a year of the existence of the covert action finding. Partly as a result of the hearings, partly as a result of the investigations, and partly out of an effort to develop again that relationship of trust and confidence between the surrogate committees and the

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administration, we are now going through a series of negotiations which will require inside the law specific commitments by the administration for what it means by "in a timely fashion." These negotiations are substantially completed. Those of you coming to the breakfast this morning who had time to glance at your papers will see on the front page a report of a presidential letter issued Friday to the Congress reassuring them of the President's commitment to develop these rules inside the administration. But internally, just as we did in the FBI for undercover operations, we are watching closely and improving the management capability to deal with covert activity. It is not enough just for the President to make a finding authorizing and directing us to take some covert activity. We have to know before the President makes that finding that it is doable, and doable in a lawful way. And we have to be sure that the individuals who are out on the firing line, outside the protection of our Constitution and our laws, in many instances, can do their work in accordance with the flexibility that they need, with the clearest possible training and understanding of their responsibilities to the CIA and to the country.

The National Security Planning Group of the National Security Council has an obligation before it goes to the National Security Council to look carefully at all the aspects of a covert finding and ask itself these kinds of questions: Will it work? Is it consistent with overt United States policy? What are the consequences going to be if the activity is publicly exposed? Is it consistent with American values? Not all covert activities will succeed, but I believe that if subjected to these kinds of tests, and this kind of management, we have the best chance of getting the maximum and most effective and productive use from our covert capability.

In our relationship with the Congress, I believe it is important for us to recognize that it must be one of truth and not of deception. There is so much confusion about deniability and deception coming over the television tubes that I think it's important to make one legitimate distinction. In covert activity there is often deception to conceal the source of the activity in order to influence through means that we believe to be appropriate but which must necessarily be covert. But in dealing with the Congress there is absolutely no excuse for deception. There may be occasions—and I told the Congress this in my testimony—when I did not believe that I was in a position to respond to a particular question, particularly if it were one in open session. But I believe it is possible to tell the Members of Congress—and I have done so on occasion—that I am not at liberty to answer the question, that I have an answer but I cannot give it. That, in my view, is a lot different from trying to answer the question narrowly when I know what the Congress wants to hear from me, and pretending that they have failed to ask the question accurately enough, giving them an answer only to the narrow question that they have asked. I think we have an obligation to speak to each other as individuals doing business with each other, knowing what each other wants to know and being honest about whether we are going to tell them or not tell them. If I decline to tell, for reasons that seem legitimate to me, or under the particular circumstances in which the question is asked, there are always opportunities to elevate that issue—for Congress to appeal over my head—or they might make it rough enough on me that I may conclude that I should. But at least a level of honesty that nothing is being withheld by deception is vitally important in the relationship of the balance and sharing of powers.

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I think this is best expressed by Sir William Stephenson in the introduction to the book written about him some years ago, *A Man Called Intrepid*. Sir William is now in his nineties. We continue to communicate regularly. He wrote this: "Perhaps a day will dawn when tyrants can no longer threaten the liberty of any people. When the function of all nations, however varied their ideologies, will be to enhance life not to control it. If such a condition is possible, it is in a future too far distant to foresee. Until that safer, better day, the democracies will avoid disaster and possible total destruction only by maintaining their defenses. Among the increasingly intricate arsenals across the world, intelligence is an essential weapon. Perhaps the most important. But it is, being secret, the most dangerous. Safeguards to prevent its abuse must be devised, revised, and rigidly applied. But as in all enterprise the character and wisdom of those to whom it is entrusted will be decisive. In the integrity of that guardianship lies the hope of free people to endure and prevail." <sup>10</sup>

I believe that in the shared responsibility of intelligence collection and analysis as well as in the use of special activities in support of foreign policy implementation, integrity is vitally important both on the executive and on the congressional side. We in the intelligence community must work closely with those who must make the policy recommendations that define our present and shape our future, providing our assessments objectively, professionally, helping to put truth into action. We must work with the congressional committees which act in secret matters as surrogates for the Congress and the American people, and we must be worthy of their trust. We must diligently carry out our assignments around the world, however difficult, with fidelity to the Constitution and the laws of our beloved country. A nation dedicated to the rule of law can protect itself and its heritage in no other way.

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"The preservation of the Constitution from infraction is the President's highest duty. . . . The President's power is negative merely, and not affirmative. He can enact no law. . . . Any attempt to coerce the President to yield his sanction to measures which he can not approve would be a violation of the spirit of the Constitution, palpable and flagrant, and if successful would break down the independence of the executive department, and make the President, elected by the people and clothed by the Constitution with power to defend their rights, the mere instrument of a majority of Congress."

James Knox Polk  
5 December 1848

"If the Federal Government will confine itself to the exercise of powers clearly granted by the Constitution, it can hardly happen that its action upon any question should endanger the institutions of the States or interfere with their right to manage matters strictly domestic according to the will of their own people."

Franklin Pierce  
4 March 1853

"Public officers are the servants and agents of the people, to execute the laws which the people have made and within the limits of a Constitution which they have established."

Grover Cleveland  
7 October 1882

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<sup>10</sup> Stevenson, William, *A Man Called Intrepid*, New York and London, Harcourt Brace Jovanovich, 1976, p. XVI.